No. 85-204

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO TRIBUNE COMPANY,
ROCKWELL GRAPHIC SYSTEMS, INC.;
ROCKWELL INTERNATIONAL CORPORATION;
ACCO INDUSTRIES, INC.; ARROW ELECTRONICS, INC.;
RYCO GRAPHIC MANUFACTURING, INC.;
SIGNODE CORPORATION; and
CENTRAL DATA CORPORATION,

Appellants,

vs.

J. THOMAS JOHNSON, individually and as Director,
Illinois Department of Revenue; and JERRY COSENTINO,
individually and as State Treasurer of Illinois; and
THE DEPARTMENT OF REVENUE OF THE
STATE OF ILLINOIS,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

REPLY TO APPELLEES' MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

WILLIAM G. SCHOPF, JR.
ANDREW BUTZ
19 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5563

DON H. REUBEN
19 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5555
Attorney for Appellants

LAWRENCE GUNNELS
435 North Michigan Avenue
Chicago, Illinois 60611
(312) 222-3933

Of Counsel

Dated: October 4, 1985

Pandick Midwest, Inc., Chicago, Illinois • 733-6000

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Illinois has conceded, by its silence in the motion to dismiss:

(1) That its use tax on machinery and equipment fell on the Chicago Tribune but no other manufacturer of personal property;

(2) That the legislative debates that resulted in the statute at issue here disclose marked animus towards newspapers generally and the Chicago Tribune in particular;[1]

(3) That no compelling state interest was served by the two-year tax window that ensnared what must be the

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[1] In reaching its decision that newspapers were not "tangible personal property," the Illinois Supreme Court, per Justice Ward, reviewed the legislative debates, relying upon selected observations and comments of the legislators to justify holding that a newspaper is not "tangible personal property." Justice Ward, however, made no reference to the statements in the same debates that reflect hostility towards the press and the Chicago Tribune. (App. A at 4a-5a.) Justice Ward wrote:

> It is of course fundamental that in statutory construction a court will seek to determine the legislative intendment. . . . The legislative history or background of a statute may be instructive in ascertaining the intent of the legislature. . . . It is appropriate to do so here to determine whether the legislature, in light of the newsprint exemption, intended that printing presses were to be considered "machinery . . . primarily [used] in the process of the manufacturing . . . of tangible personal property." (*Id.* at 4a (citations omitted).)

On October 3, 1985, in a slip decision adversely affecting the right of the Chicago Cubs, a sister company of the Chicago Tribune, to play night baseball in Wrigley Field, *Chicago National League Ball Club, Inc. v. Thompson*, ____ Ill. 2d ____ (1985) (Docket No. 61630), Justice Ward wrote:

> To support this contention, the Cubs would have us consider comments made in the legislature and city council which the Cubs say sustain their claim that the motive for enacting the statute and ordinance was to prohibit night games at Wrigley Field only and not at other stadia or parks. The contention, however, even if gratuitously assumed to be true, does not have legislative relevance. The plaintiff does not charge that either enactment is ambiguous or that the legislative intention is unclear. ***When the language of a statute or ordinance is clear courts will give effect to the legislation without resort to unnecessary means of statutory interpretation, such as comments by legislators.*** (Slip opinion, at 4-5 (citation omitted).)

largest capital investment in history by an Illinois newspaper; and

(4) That the practical effect of this Illinois tax scheme is the same as the Minnesota "trade-off" tax held unlawful by this Court in 1983 in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983).

Moreover, Illinois never even addresses here the proposition that approval of the tax technique it adopted to impose a special tax on newspaper presses is an unconstitutional taxing strategy and should be so declared now to preclude further such excesses.

Illinois contends that review here will involve "a reexamination of the facts and not a substantial federal question." (*See* Motion To Dismiss, at 1-2.) The facts require no reexamination; they are totally undisputed. The State conducted no discovery, presented no witnesses, and filed no post-trial or post-judgment motions during proceedings in the trial court. On appeal, the State did not question any of the trial court's findings of fact. The Illinois Appellate and Supreme Courts accepted the factual findings of the trial court and neither party disputes those findings here.

Rather, this appeal squarely raises the constitutionality of a statutory interpretation made by the state appellate courts below that the Chicago Tribune is not entitled to an exemption for its tools of manufacturing when that exemption is granted to all other manufacturers similarly situated. Whether a state statute as interpreted by the state courts violates the First Amendment's guarantee of a free press is most plainly a substantial federal question. (*See* Jurisdictional Statement, at 3.)

The whole thrust of the State's argument is that the Illinois use tax exemption applies only to "machinery and equipment used to produce tangible personal property *subject to retailers'*

occupation tax." (Emphasis added.) (*See* Motion To Dismiss, at 8-9 (as to freedom of the press); *see also id.* at 5-6 (as to equal protection).) That precise justification for levying a "trade-off" tax on newspapers specially, as occurred here, was explicitly constitutionally rejected by the Court in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, supra,* 460 U.S. at 588-90. (*See* Jurisdictional Statement, at 16-17.)

Nor would allowing the Chicago Tribune the use tax exemption for its presses deny equal protection to the electronic media. The electronic media do not manufacture anything and there is nothing unlawfully discriminatory in treating all manufacturers differently from all non-manufacturers.[2] In any event, the suggestion that the first amendment proscription against taxing newspapers specially should yield to equal protection concerns regarding radio and television is incorrect.

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[2] The State argues that, since equipment used by television and radio broadcasters to convey news is subject to use tax, newspaper presses too should be "use taxed" because both newspapers and broadcasters convey news. In fact, many printers and many television and radio stations do not convey news. Under the State's argument, the equipment of all such non-news printers *and* broadcasters would be exempt from the Illinois use tax.

CONCLUSION

For these reasons and all those set forth in appellants' Jurisdictional Statement, the Court should now note probable jurisdiction and, after hearing, reverse.

Respectfully submitted,

REUBEN & PROCTOR

DON H. REUBEN

19 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5555

Attorney for Appellants

Of Counsel:

WILLIAM G. SCHOPF, JR.
ANDREW BUTZ
19 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5563

LAWRENCE GUNNELS

435 North Michigan Avenue
Chicago, Illinois 60611
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